

ILLINOIS POLLUTION CONTROL BOARD
July 1, 1993

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 v.) PCB 93-87
) (Enforcement)
)
 SOUTH HOLLAND METAL FINISHING CO.,)
 an Illinois Corporation,)
)
 Respondent.)

ORDER OF THE BOARD (by B. Forcade):

This matter comes before the Board on several motions filed by the parties. On June 18, 1993, South Holland Metal Finishing Co. (South Holland) filed a "Motion to Dismiss", "Motion for Bill of Particulars", "Affirmative Defense" and "Request for Deposition Subpoena." On June 25, 1993, the complainant filed "Response to Motion to Dismiss", "Response to Motion to File Bill of Particulars" and "Motion to Strike Affirmative Defense."

Motion to Dismiss

South Holland argues that the complaint does not satisfy the requirements of 35 Ill. Adm. Code 103.122(c)(2) in that the complaint is too vague and general to allow the preparation of a proper defense. South Holland contends that the allegations fail to state whether the emissions are real or actual or only threatened. South Holland also contends that the complaint does not provide any specifics of the nature of the alleged emissions.

Complainant notes that the motion to dismiss was not filed within 14 days after receipt of the complaint as required by the Board's rules but was filed 36 days after the receipt of the complaint. (35 Ill. Adm. Code 103.140(a).) The complainant also notes that the motion is directed to neither the Board nor the hearing officer. (35 Ill. Adm. Code 101.241.) Complainant contends that the motion to dismiss should be stricken because it is not timely and is not directed to the Board.

In addition, the complainant argues that the complaint meets the procedural requirements. The complainant contends that the complaint alleges construction and operation of air emission equipment without the proper permits and therefore actual emissions are not a necessary element. Complainant argues that the complaint meets the required standards and that the allegations are not too vague or general.

The Board denies the motion to dismiss. The Board finds the motion to be untimely. The motion to dismiss was not filed within 14 days of the receipt of the complaint as required by the

Boards procedural rules. In addition the Board finds that the complaint provides sufficient information to fulfill the notice requirements of a complaint. The complaint provides adequate information to inform respondent of the nature of the complaint and for respondent to prepare a defense.

Motion for Bill of Particulars

South Holland notes that the complaint alleges that certain plating lines constructed and operated by South Holland "emit, or are capable of emitting, particulate matter." Based on this allegation South Holland seeks a bill of particulars describing the nature and extent of the emissions.

Complainant alleges that because the complaint is legally sufficient, as argued in its response to the motion to dismiss, a bill of particulars should not be required.

The Board will not order complaint to file a bill of particulars. The Board does not find the information requested by the respondent to be relevant to the stated cause of action of constructing or operating an air emission source without a permit.

Motion to Strike Affirmative Defense

Complainant contends that respondent's affirmative defense should be stricken because it was not timely filed. The Board's procedural rules allow for the filing of an "answer within 30 days of receipt of the complaint." Complainant notes that respondent received the complaint on May 11, 1993. The affirmative defense was filed on June 16, 1993, more than 30 days after the receipt of the complaint. The complainant also argues that the defense presented by respondent is essentially a legal argument and is therefore not a proper affirmative defense.

A hearing in this matter is presently scheduled for August 3, 1993. While the Board notes that the time to reply to the Agency's June 25, 1993 motion to strike has not yet expired, the Board will decide this motion in order to prevent undue delay.

Section 103.122(d) allows the filing of an affirmative defense with the answer or supplemental answer prior to hearing:

Respondent may file an answer within 30 days of receipt of the complaint. All material allegations of the complaint shall be taken as denied if not specifically admitted by answer, or if no answer is filed. Any facts constituting an affirmative defense which would be likely to take the complainant by surprise must be plainly set forth prior to hearing in the answer or

supplemental answer filed pursuant to section 103.210(b).

Section 103.210(b) allows for supplemental pleadings as follows:

At any time prior to commencement of hearing and prior to the close of hearing, the Hearing Officer may upon motion of a party permit a supplemental pleading setting forth continuing transactions or occurrences which have continued or occurred subsequent to the date of filing of the initial pleading or any amendment thereto, so long as no undue surprise results that cannot be remedied by a continuance.

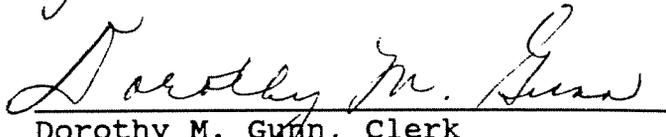
The Board finds that the affirmative defense was not filed within 30 days of the receipt of the complaint as required by the Board's rules. However, the Board notes that supplemental pleadings are allowed so long as no undue surprise that cannot be remedied by a continuance would result. (City of Des Plaines v. Solid Waste Agency of Northern Cook County (January 7, 1993), PCB 92-127.) Complainant does not argue that the affirmative defense created any undue surprise that cannot be remedied by a continuance. The affirmative defense was filed in advance of hearing and the hearing officer is authorized to continue the August 3, 1993 hearing if necessary.

Further, the Board finds that the affirmative defense presented by respondent is proper. While the defense presents some legal arguments, these arguments are based on facts alleged by the respondent.

Therefore, the Board denies the motion to strike the affirmative defense.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 1st day of July, 1993, by a vote of 7-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board